



POLICE DEPARTMENT

November 14, 2023

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In the Matter of the Charges and Specifications :

Case No.

- against - :

2022-24717

Police Officer Anthony Fernandez :

Tax Registry No. 950401 :

83 Precinct :

-----X
At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Jeff S. Adler
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU:

Brian Arthur, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For the Respondent:

Michael Martinez, Esq.
Worth, Longworth & London, LLP
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To:

HONORABLE EDWARD A. CABAN
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Police Officer Anthony Fernandez, on or about June 2, 2020, at approximately 2015 hours, while assigned to Vice Enforcement Division Zone 2 and on duty, in the vicinity of West Street and Morris Street (West Side Highway), New York County, wrongfully used force, in that he struck **Complainant** with a baton without police necessity.

P.G. 221-02, Page 2, Prohibition 11

USE OF FORCE

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on October 18, 2023. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The CCRB entered into evidence video footage of the incident, as well as hearsay statements of the complainant who did not appear to testify. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having evaluated all of the evidence in this matter, I find Respondent Not Guilty.

ANALYSIS

On the afternoon of June 2, 2020, Respondent, who at the time was assigned to the Queens Vice Enforcement Unit, was mobilized in response to the George Floyd protests that were occurring throughout the city. Shortly before 2000 hours, he was deployed to the vicinity of the West Side Highway in Manhattan, where protesters were blocking traffic, as they walked south in the direction of the tunnel. At 2000 hours, with the curfew in effect, police officers attempted to disperse the marchers before they reached the tunnel, approaching the protesters head-on and ordering them off the street. Respondent was part of this effort, and at

approximately 2015 hours he had an encounter with the complainant, who was one of the protesters. That encounter is the subject of the one specification in this case.

Specifically, it is alleged that Respondent wrongfully used force against the complainant, in that he twice struck him with a baton, causing the complainant to sustain a fracture to his left hand. Medical records from CityMD and Maimonides Hospital (CCRB Exs. 3 & 4) confirm the injury, which also is depicted in a photograph showing bruising to the hand (CCRB Ex. 5). Respondent concedes that he did swing his baton two times, but states that he did not aim at, or strike, the complainant's body. Rather, Respondent contends that he struck the skateboard being held by the complainant, which Respondent believed would be used as a weapon against a fellow officer.

Video footage from different sources captures part of the encounter from different perspectives. In video shot by a civilian from an apartment above the street (CCRB Ex. 15), the complainant, facing south, can be seen engaging an unknown police officer on the street. Whereas most of the protesters are gradually retreating, the complainant, who maneuvers a skateboard in his hands into a horizontal position in front of him, walks several steps toward the unknown officer. (CCRB Ex. 15 at 00:11) That officer uses his baton to push back the complainant. The complainant still does not retreat, nor does he stand still with the skateboard in front of him in a defensive posture; instead, he steps back toward the unknown officer while raising the skateboard into a more vertical position. At 00:15, the video shows Respondent, who is behind and to the left of his fellow officer, moving toward the complainant and twice swinging his baton in the direction of the skateboard. After the swings, the complainant turns and, for the first time, starts moving away from the police. Several officers, led by a supervising officer in a white shirt, pursue the complainant and tackle him to the ground.

Separate footage taken with the Body-Worn Camera (“BWC”) of another officer on the scene shows the encounter from behind on street level. That footage, along with a slowed-down version, and several screenshots from the video, were admitted into evidence. (CCRB Exs. 7-14) In that footage, officers can be heard ordering the protesters to keep moving. Several protesters, who are not complying, are physically brought to the ground by police and taken into custody. Rather than retreat, the complainant, skateboard in hand, steps forward and comes face-to-face with the unknown officer. (CCRB Ex. 7 at 01:55) That officer pushes the complainant back, but the complainant does not retreat. Instead, the complainant again engages the officer, while moving the skateboard in his hands. At this point, Respondent steps toward the complainant with a baton in his right hand. As Respondent swings the baton twice, sounds can be heard which are consistent with the baton making contact with the skateboard. (CCRB Ex. 7 at 01:58) The complainant turns and begins to run in the opposite direction, pursued by several officers including a supervisor.

A third video from an unknown source (CCRB Ex. 16) shows the aftermath of the encounter, with the complainant on the ground and several officers on top of and around him. One officer strikes the complainant in his lower legs with a baton as the complainant is being placed in custody. (CCRB Ex. 16 at 00:24) It is not alleged that Respondent took part in this portion of the incident.

The complainant did not appear to testify. Instead, the CCRB offered into evidence recordings and transcripts of two phone interviews conducted by the CCRB, one on June 22, 2020 (CCRB Exs. 1 & 1A), and the second on July 20, 2020 (CCRB Exs. 2 & 2A). Counsel for Respondent offered into evidence a third phone interview, which occurred on June 12, 2020. (Resp. Exs. A & A-1) It is well-settled that hearsay evidence is admissible in administrative

proceedings, and may form the sole basis for a finding of fact. The hearsay, however, must be carefully evaluated to determine whether it is sufficiently reliable. It is preferable to have testimony from a live witness, where opposing counsel has the opportunity to cross examine, and the court can observe witness demeanor. In the absence of live testimony from the complainant here, this tribunal carefully considered his prior statements, in conjunction with the other evidence presented.

In his CCRB interview on June 12, 2020, the complainant confirmed that he was marching in the street after the curfew, and the police were telling the protesters to move back. He stated, "I ran and was tackled. And I was beaten with batons. And my hand was broken. I was [zip-tied], and they continued to beat me with batons." During this initial interview, the complainant did not mention anything about being struck in his hand with a baton before he ran and was tackled from behind. Rather, he focused on how he was beaten by multiple officers once he was on the ground, and that his left hand was broken. He described the whole incident as happening very fast, after which he was issued a summons. The next day he went to CityMD, where his hand was placed in a temporary cast, and he followed up with a specialist the following day. (Resp. Ex. A1 at 11, 14, 17, 20-23, 34)

When he was re-interviewed on June 22, 2022, the complainant added to his initial narrative, noting for the first time that officers were swinging batons at him before he ran. He stated that he held his skateboard up to try to "block a shot," but it did not work, and "that might have been where [his] hand got cracked." The complainant insisted he did not use the skateboard as a weapon. (CCRB Ex. 1A at 8-11) Similarly, in his third interview on July 20, 2020, the complainant stated that he was "whacked in the hand" without warning, at which point

he ran, was tackled, and repeatedly struck by officers while he was on the ground. He again maintained that he did not use the skateboard as a weapon. (CCRB Ex. 2A at 3-8)

Respondent testified that he was sent to the location in response to a call that there were police officers in need of assistance, including officers inside an RMP who were surrounded by protesters. It was after curfew, and his orders were to disperse the 100-150 protesters who were marching south toward the tunnel. Respondent stated that there was a lot of violence and hostility directed towards police officers: objects were being thrown by protesters, some were raising skateboards, and he observed one officer being struck with a bicycle. It was in this context that Respondent's encounter with the complainant occurred. (Tr. 45-47, 58-60, 68)

According to Respondent, he was behind an unknown fellow officer, whom he observed ordering the complainant to move back. Unlike most of the other protesters, the complainant, who was holding a skateboard across his chest, did not comply. Respondent saw the unknown officer push the complainant back. The complainant again moved forward toward the officer and raised the skateboard into a vertical position, as if he were preparing to strike the officer. Respondent testified that based on the totality of his observations, he believed that the complainant was going to use the skateboard as a weapon, and he was concerned for the safety of his fellow officer. He acknowledged, though, that he did not specifically see the complainant swing the skateboard at anyone, and did not hear the complainant make any threatening statements. (Tr. 48-50, 56-57, 60)

Respondent testified that he twice swung his baton at the skateboard, with the intention of knocking it out of the complainant's hand so that he could not use it as a weapon. He insisted he was not trying to strike the complainant's body, and did not believe that he did so. The skateboard almost fell, but the complainant was able to maintain control, at which point he

turned and ran. Other officers, including a supervisor, pursued the complainant and tackled him to the ground; Respondent was not part of that group of officers that struck the complainant on the ground, nor was he part of the arrest. (Tr. 50-52, 55, 58, 67)

Several months later, on September 24, 2020, Respondent was interviewed virtually by the CCRB. At that time, Respondent was unable to specifically recall the incident, even with the aid of video footage on a laptop that Respondent described as blurry. Respondent testified that he was regularly working 16-20 hour shifts for several weeks during the protests, making it difficult to recall particular events. Later, after conferring with his attorney, and viewing the video footage over a dozen times, Respondent was able to recall what occurred. (Tr. 53-55, 61-63, 67)

Respondent is charged with wrongfully using force, in that he struck the complainant with a baton without police necessity. Sections 221-01 & 221-02 of the Patrol Guide set forth the Department's guidelines regarding the use of force. The rules state that all MOS are responsible and accountable for the proper use of force. Force may be used when it is reasonable to ensure the safety of a member of the service. "In all circumstances, any application or use of force must be reasonable under the circumstances."

Since the complainant chose not to appear to testify, he was not subjected to cross examination. Had he appeared at trial, defense counsel could have explored with the complainant why, in his initial CCRB interview, he did not even mention the encounter with the unknown officer and Respondent, and focused instead on what occurred after he was tackled to the ground; this omission calls into question whether he knew when and how his hand was actually injured. Additionally, in his hearsay statements, the complainant claimed he did not intend to use the skateboard as a weapon, but he was never really challenged on that assertion. It

would have been useful to have the complainant explain in greater detail why he disobeyed orders to move away, and instead aggressively stepped toward the unknown police officer while holding his skateboard in a raised position. Similarly, he could have been asked to explain why even after being pushed away by that officer, he chose to step back toward the officer again, while moving his skateboard forward and into a vertical position.

Respondent, in contrast, testified and answered questions from both counsel convincingly. After carefully considering Respondent's testimony, in conjunction with the other evidence presented, including the video footage, I credit his account of what occurred. Respondent's testimony was detailed, consistent, and logical, as he described the dangerous and chaotic scene in which this incident unfolded. The video footage essentially corroborated his account as to the complainant's aggressive behavior leading up to the encounter. Whereas most of the protesters were complying with the police orders to move away, the complainant twice disobeyed those instructions. He did not retreat, nor did he merely stand still; rather, *he twice aggressively stepped forward toward the unknown officer*, even after being pushed away. Moreover, he did so with a skateboard raised in front of him, which he adjusted in a way that suggested he was using it as more than a shield.

In this context, Respondent was reasonably concerned that the safety of the other officer was at risk. In response to that threat, Respondent twice swung his baton at the complainant's skateboard, with the intention of removing it as a potential weapon. As noted above, the sound of his baton striking the skateboard can be heard on the video recording. (CCRB Ex. 7) To be sure, the complainant's hand appears to have been injured at some point during this incident, and that injury may have occurred when Respondent struck the skateboard with his baton. Even so, under the totality of the specific circumstances presented here, I find that Respondent acted

reasonably to ensure the safety of himself and his fellow officer, and that his actions did not constitute an excessive use of force. The record has failed to establish, by a preponderance of the credible evidence, that Respondent wrongfully used force without police necessity.

Accordingly, I find him Not Guilty.

Respectfully submitted,



Jeff S. Adler

Assistant Deputy Commissioner Trials

APPROVED

JAN 16 2024

EDWARD A. CABAN
POLICE COMMISSIONER